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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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13 MICHAEL HAYES,

14 Plaintiff,

15 v.

16
17 CAROLYN W. COLVIN, Acting
18 Commissioner of Social Security,
19 Defendant.
20

Case No.: 3:16-cv-00140-JLS-MDD

**REPORT AND
RECOMMENDATION ON
CROSS MOTIONS FOR
SUMMARY JUDGMENT**

[ECF NOS. 11,12]

21 Plaintiff Michael Hayes (“Plaintiff”) filed this action pursuant to
22 42 U.S.C. § 405(g) for judicial review of the decision of the
23 Commissioner of the Social Security Administration (“Commissioner”)
24 denying Plaintiff’s application for disability and disability insurance
25 benefits under Title II for supplement security income payments under

1 Title XVI of the Social Security Act. Plaintiff moves the Court for
 2 summary judgment reversing the Commissioner and ordering an award
 3 of benefits, or, in the alternative, to remand the case for further
 4 administrative proceedings. (ECF No. 11). Defendant moved for
 5 summary judgment affirming the denial of benefits. (ECF No. 12).

6 For the reasons expressed herein, the Court recommends the case
 7 be remanded for further review of Plaintiff's allegations of right knee
 8 impairment. Regarding the remaining claims presented, it is
 9 recommended that Plaintiff's motion for summary judgment be denied
 10 and Defendant's motion be granted.

11 **I. BACKGROUND**

12 Plaintiff alleges that he became disabled on March 1, 2012, due to
 13 a right knee impairment and several mental impairments (i.e.,
 14 depression and bipolar disorder with symptoms of anger, racing
 15 thoughts, manic episodes and an inability to focus or concentrate).
 16 (A.R. 17-18).¹ Plaintiff's date of birth, November 8, 1972, categorizes
 17 him as a younger person on the alleged disability onset date. 20 C.F.R.
 18 §§ 404.1563, 416.963. (A.R. 19).

19 **A. Procedural History**

20 On October 24, 2012, Plaintiff filed an application for social
 21 security disability insurance benefits. (A.R. 141-147). This claim was
 22 initially denied on January 8, 2013, and denied upon reconsideration on
 23 April 4, 2013. (A.R. 12). On February 28, 2014, Plaintiff appeared via
 24

25 ¹ "A.R." refers to the Administrative Record filed on May 15, 2016, and
 is located at ECF No. 9.

1 video teleconference from San Diego, California before Administrative
 2 Law Judge (“ALJ”) Paul Coulter in San Bernardino, California. (*Id.*).
 3 Plaintiff and Gregory S. Jones, an impartial Vocational Expert (“VE”),
 4 testified. (*Id.*).

5 On April 11, 2014, the ALJ issued a written decision finding
 6 Plaintiff not disabled. (A.R. 12). Plaintiff appealed, and the Appeals
 7 Council declined to review the ALJ’s decision. (A.R. 1). Consequently,
 8 the ALJ’s decision became the final decision of the Commissioner. (*Id.*).

9 On January 21, 2016, Plaintiff filed a Complaint with this Court
 10 seeking judicial review of the Commissioner’s decision. (ECF No. 1).
 11 On April 15, 2016, Defendant answered and lodged the administrative
 12 record with the Court. (ECF Nos. 8, 9). On July 22, 2016, Plaintiff
 13 moved for summary judgment. (ECF No. 11). On August 15, 2016, the
 14 Commissioner cross-moved for summary judgment and responded in
 15 opposition to Plaintiff’s motion. (ECF Nos. 12, 13). Lastly, on August
 16 29, 2016, Plaintiff replied to the Commissioner’s response. (ECF No.
 17 14).

18 **II. DISCUSSION**

19 **A. Legal Standard**

20 The supplemental security income program provides benefits to
 21 disabled persons without substantial resources and little income. 42
 22 U.S.C. § 1383. To qualify, a claimant must establish an inability to
 23 engage in “substantial gainful activity” because of a “medically
 24 determinable physical or mental impairment” that “has lasted or can be
 25 expected to last for a continuous period of not less than 12 months.” 42

1 U.S.C. § 1382c(a)(3)(A). The disabling impairment must be so severe
2 that, considering age, education, and work experience, the claimant
3 cannot engage in any kind of substantial gainful work that exists in the
4 national economy. 42 U.S.C. § 1382c(a)(3)(B).

5 The Commissioner makes this assessment through a process of up
6 to five steps. First, the claimant must not be engaged in substantial,
7 gainful activity. 20 C.F.R. § 416.920(b). Second, the claimant must
8 have a “severe” impairment. 20 C.F.R. § 416.920(c). Third, the medical
9 evidence of the claimant’s impairment is compared to a list of
10 impairments that are presumed severe enough to preclude work. 20
11 C.F.R. § 416.920(d). If the claimant’s impairment meets or is
12 equivalent to the requirements for one of the listed impairments,
13 benefits are awarded. If the claimant’s impairment does not meet or is
14 not equivalent to the requirements of a listed impairment, the analysis
15 continues to a fourth and possibly fifth step and considers the
16 claimant’s residual functional capacity. At the fourth step, the
17 claimant’s relevant work history is considered along with the claimant’s
18 residual functional capacity. If the claimant can perform the claimant’s
19 past relevant work, benefits are denied. 20 C.F.R. § 416.920(e). At the
20 fifth step, if the claimant is found unable to perform the claimant’s past
21 relevant work, the issue is whether the claimant can perform any other
22 work that exists in the national economy, considering the claimant’s
23 age, education, work experience, and residual functional capacity. If
24 the claimant cannot do other work that exists in the national economy,
25 benefits are awarded. 20 C.F.R. § 416.920(f).

1 Section 1383(c)(3) of the Social Security Act, through Section
 2 405(g) of the Act, allows unsuccessful applicants to seek judicial review
 3 of a final agency decision of the Commissioner. 42 U.S.C. §§ 1383(c)(3),
 4 405(g). The scope of judicial review is limited and the Commissioner’s
 5 denial of benefits “will be disturbed only if it is not supported by
 6 substantial evidence or is based on legal error.” *Browner v. Secretary of*
 7 *Health & Human Services*, 839 F.2d 432, 433 (9th Cir. 1988) (quoting
 8 *Green v. Heckler*, 803 F.2d 528, 529 (9th Cir. 1986)).

9 Substantial evidence means “more than a mere scintilla” but less
 10 than a preponderance. *Sandqathe v. Chater*, 108 F.3d 978, 980 (9th Cir.
 11 1997). “[I]t is such relevant evidence as a reasonable mind might accept
 12 as adequate to support a conclusion.” *Id.* (quoting *Andrews v. Shalala*
 13 53 F.3d 1035, 1039 (9th Cir. 1995)). The court must consider the record
 14 as a whole, weighing both the evidence that supports and detracts from
 15 the Commissioner’s conclusions. *Desrosiers v. Secretary of Health &*
 16 *Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). If the evidence
 17 supports more than one rational interpretation, the court must uphold
 18 the ALJ’s decision. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 19 When the evidence is inconclusive, “questions of credibility and
 20 resolution of conflicts in the testimony are functions solely of the
 21 Secretary.” *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

22 The ALJ has a special duty in social security cases to fully and
 23 fairly develop the record in order to make an informed decision on a
 24 claimant’s entitlement to disability benefits. *DeLorme v. Sullivan*, 924
 25 F.2d 841, 849 (9th Cir. 1991). Because disability hearings are not

adversarial in nature, the ALJ must “inform himself about the facts relevant to his decision,” even if the claimant is represented by counsel. *Id.* (quoting *Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983)).

Even if a reviewing court finds that substantial evidence supports the ALJ’s conclusions, the court must set aside the decision if the ALJ failed to apply the proper legal standards in weighing the evidence and reaching his or her decision. *Benitez v. Califano*, 573 F.2d 653, 655 (9th Cir. 1978). Section 405(g) permits a court to enter a judgment affirming, modifying or reversing the Commissioner’s decision. 42 U.S.C. § 405(g). The reviewing court may also remand the matter to the Social Security Administration for further proceedings. *Id.*

B. The ALJ’s Decision

The ALJ concluded Plaintiff was not disabled, as defined in the Social Security Act, from March 1, 2012, through the date of the ALJ’s decision, April 11, 2014. (A.R. 12).

The ALJ found Plaintiff has the following severe impairments: right knee osteoarthritis, obesity, bipolar disorder, anger disorder, depressive disorder, intermittent explosive disorder, and polysubstance abuse in remission (20 C.F.R. § 404.1520(c)). (A.R. 14). The ALJ determined Plaintiff did not have an impairment or combination of impairments that meets or was medically equivalent to the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526). (A.R. 15-16). The ALJ noted that “[n]o treating or examining physician has recorded findings equivalent in severity to the criteria of any listed

1 impairment, nor does the evidence show medical findings that are the
2 same or equivalent to those of any listed impairment.” (A.R. 15).

3 The ALJ found that Plaintiff has the residual functional capacity
4 (“RFC”) to:

5 [P]erform medium work . . . except [Plaintiff] can lift, carry,
6 push or pull 50 pounds occasionally and 25 pounds frequently.
7 [Plaintiff] can stand, walk and sit for about 6 hours out of an
8 8-hour workday. Postural activities such as climbing,
9 balancing, stooping, kneeling, crouching, and crawling can be
10 performed on an occasional basis; however, no work on
11 ladders, ropes, or scaffolds. [Plaintiff] can understand,
12 remember, and carry out simple job instructions, but would
13 be unable to perform work that would require directing
14 others, abstract thought, or planning. [Plaintiff] can have
15 occasional interaction with coworkers and supervisors, but no
16 direct interaction with the general public.

17 (*Id.*). The ALJ supported his RFC finding by explaining:

18 In sum, the evidence as a whole supports the [RFC] assessed
19 by this decision. . . . [Plaintiff’s] subjective complaints are only
20 partially credible and the objective medical evidence does not
21 support the alleged severity of his symptoms. The
22 undersigned finds the [Plaintiff] has not been deprived of the
23 ability to perform work subject to the residual functional
24 capacity assessed by this decision for any 12-month period
25 since the alleged onset date.

(A.R. 19).

26 The ALJ found that Plaintiff “meets the insured status
27 requirements of the Social Security Act through December 31, 2015.”
28 (A.R. 14). Furthermore, the ALJ noted, Plaintiff “has at least a high
29 school education and can communicate in English (20 C.F.R. §

1 404.1564).” (A.R. 20). According to the ALJ, transferability of job skills
2 is a nonissue because Plaintiff “does not have past relevant work (20
3 C.F.R. § 404.1568).” (*Id.*).

4 Gregory S. Jones, the VE, testified that Plaintiff can perform
5 occupations such as hand packager, industrial cleaner, or cleaner. (*Id.*).
6 Relying on the VE’s testimony, Plaintiff’s age, education, work
7 experience, and RFC, the ALJ concluded that Plaintiff is capable of
8 successful adjustment and performance in other jobs that exist in
9 significant numbers in the national economy. (A.R. 20-21). This
10 required a finding that he is not disabled. (*Id.*).

11 In determining that Plaintiff is not disabled, the ALJ specifically
12 noted the following to be of particular relevance:

13 **1. Nonexertional Impairments**

14 **a) State Agency Mental Medical Consultants**

15 The ALJ afforded significant, but not full, weight to the State
16 agency mental medical consultants on initial review and on
17 reconsideration. (A.R. 19). Dr. Rose Moten, PhD., found mild
18 restriction in activities of daily living and in maintaining concentration,
19 persistence or pace. (A.R. 54). Dr. Moten found moderate difficulties in
20 maintaining social functioning. No repeated episodes of
21 decompensation, each of extended duration were found. (*Id.*). The
22 report of Dr. Funkenstein, M.D., found Plaintiff does have a medically
23 determinable impairment “that could reasonably produce the alleged
24 symptoms.” (A.R. 67). “The severity of his limitations do not preclude
25 [an] ability to engage in simple, unskilled work activity.” (*Id.*). Dr.

1 Funkenstein added that Plaintiff “demonstrates cognitive strengths and
2 has no difficulty in comprehending and carrying out simple directions.”
3 (A.R. 69). Neither did Dr. Funkenstein believe that Plaintiff’s activities
4 of daily living reflected “significant limitations due to mental
5 functioning.” (*Id.*)

6 Generally, all the State agency medical consultants opined that
7 Plaintiff is able to understand, remember, and carry out simple job
8 instructions.

9 **b) John Jeter, MA, LLP, LMSW**

10 The ALJ afforded significant, but not full, weight to the
11 psychiatric consultative examination on December 28, 2012,
12 administered by Mr. Jeter supervised by Hugh Bray, PhD. (A.R. 17,
13 229-233). According to Mr. Jeter, Plaintiff alleged he had bipolar
14 disorder and stayed in his room all day staring out the window. (*Id.*).
15 He also admitted to a long history of substance abuse (i.e., alcohol,
16 cocaine, and methamphetamines). (*Id.*). At the examination, Plaintiff
17 could recall four numbers forward and three numbers backward. (A.R.
18 15). In addition, he spelled the word “world” backwards and subtracted
19 3’s from 100 in two minutes (but only accurately to 76). (*Id.*). The
20 examiner diagnosed Plaintiff with bipolar disorder, depression, and
21 polysubstance abuse in remission with moderate difficulties in his
22 ability to get along appropriately with the public and supervisors. (A.R.
23 17, 233). Further, despite the fact that Plaintiff was not on medication,
24 Mr. Jeter found no difficulty in [Plaintiff’s] ability to comprehend and
25 carry out simple directions, and perform routine simple tasks. (233).

**c) Other Records Related to Plaintiff's Nonexertional
Impairments**

In March 2013, Plaintiff began taking medication for his psychiatric condition. (A.R. 18). In May 2013, he began psychiatric treatment. (*Id.*). At his first treatment, Plaintiff said he stopped consuming alcohol four months prior and street drugs four to five years prior. (*Id.*). Plaintiff's primary care provider diagnosed him with bipolar disorder, intermittent explosive disorder, and unspecified drug dependence. (*Id.*). Plaintiff sought mental health treatment three more times. (*Id.*). In June 2013, Plaintiff reported anger issues, so he received a Lithium prescription to replace Celexa. (A.R. 300). In November 2013, Plaintiff reported he was anxious and still angry, so he received a Depakote prescription to replace the Lithium. (A.R. 290). Lastly, in January 2014, he received a Seroquel prescription because he experienced racing thoughts, poor sleep and anxiety. (A.R. 18, 290). Plaintiff "admitted that Depakote helped control his anger issues." (A.R. 17). He testified at the Administrative Hearing that he suffered from depression, high manic episodes, and continued to have three to four bad days per week. (*Id.*).

In his self report, Plaintiff reported he neither visits with friends or family nor socializes, but he lived with his sister in 2012 and currently resides with a friend. (A.R. 15). Based on the record presented, the ALJ found Plaintiff's ability to communicate and get along with others was moderately limited. (*Id.*).

2. Exertional Impairment

a) State Agency Medical Consultants

The ALJ considered but “gave little weight to the opinions of the State agency medical consultants who opined that the claimant had no severe physical impairment and thus no corresponding limitations.” (A.R. 19). The ALJ asserted that the consultants had inadequately considered Plaintiff’s subjective complaints. In contrast to the State Agency medical consultants, the ALJ stated that he viewed the record evidence in a light most favorable to the Plaintiff and gave “generous consideration” to Plaintiff’s subjective complaints, including a finding that Plaintiff’s right knee osteoarthritis was a severe impairment. (*Id.*).

b) Other Records Related to Plaintiff’s Exertional Impairment

In March 2013, Plaintiff saw his primary care physician due to right knee pain. (A.R. 17, 287-289). By June 2013, Motrin did not relieve the pain, so x-rays were ordered. (*Id.*). In December 2013, an MRI revealed a complex tear of the medial meniscus as well as osteoarthritis. (*Id.*). In February 2014, after an examination at the San Diego Sports Medicine and Orthopedic Center, Plaintiff was diagnosed with right knee osteoarthritis. (*Id.*). Lora Rancourt, PA-C, reported decreased strength (i.e., movement against resistance, but less than normal) and tenderness to light touch. (*Id.*). Plaintiff seemed stable laterally to medially. (*Id.*). Ms. Rancourt documented that Plaintiff ambulated with an antalgic gait favoring his right side. (*Id.*). She referred Plaintiff to Dr. Myer (an orthopedic surgeon) explaining that

1 Plaintiff might benefit from removing the existing surgical hardware in
2 his knee from a surgery performed when Plaintiff was a teenager. (*Id.*).

3 Plaintiff claimed his right knee bothers him when he sits or
4 stands. (A.R. 17). Citing to Plaintiff's testimony, the ALJ noted that
5 Plaintiff "opined that he could sit for about an hour at a time and could
6 only walk for about 5 minutes." Plaintiff also noted he began taking
7 Tramadol, Gabapentin, and Naproxen for his right knee pain. (*Id.*).
8 Plaintiff reported no problems grooming himself or preparing simple
9 meals. (A.R. 15). He said that he could schedule his own medical
10 appointments and do his own laundry. (*Id.*). He stated that he neither
11 performed any household chores nor shopped for himself. (*Id.*). Based
12 upon the record presented, the ALJ found that Plaintiff can initiate and
13 participate in his own activities of daily living with only mild
14 restrictions. (A.R. 15). The ALJ noted that "there were no further
15 records to review." (*Id.*).

16 **c) Third Party Function Report**

17 The ALJ concluded that the Plaintiff's "[s]ister, who based her
18 observations and opinions on the [Plaintiff's] subjective complaints and
19 behavior, through no fault of her own, is found to be only partially
20 credible." (A.R. 19). In general, Plaintiff's sister reported that all
21 Plaintiff does "is stay in his room and sleep." (A.R.184-191). The ALJ
22 reasoned that statements by Plaintiff's sister primarily relied on
23 Plaintiff's exaggerated subjective complaints; therefore, her statements
24 were only partially credible.

25 **d) Plaintiff's Testimony**

1 The ALJ found Plaintiff's testimony concerning the intensity,
 2 persistence, and limiting effects of his alleged symptoms less than fully
 3 credible. (A.R. 17-19). Specifically, the ALJ reasoned, among other
 4 things, that "in view of the relatively benign medical evidence . . . [i]t
 5 appears the limited range of daily activities is a lifestyle choice and not
 6 due to any established impairment." (A.R. 18).

7 The ALJ found the medical record, or lack thereof, particularly
 8 important. Because Plaintiff described a long history of bipolar disorder
 9 but did not seek psychiatric treatment until March 2013, the ALJ
 10 determined that the alleged severity and corresponding limited
 11 treatment diminished Plaintiff's credibility. (A.R. 18). Similarly, the
 12 ALJ recognized Plaintiff's "relatively sparse" medical record and found
 13 that despite Plaintiff's alleged severe and disabling physical pain, he
 14 did not seek a "greater level of intervention and/or more aggressive
 15 treatment options" as one would expect by an individual with such
 16 severe and disabling impairments. (*Id.*). Accordingly, the ALJ
 17 concluded that Plaintiff "may have exaggerated his symptoms and their
 18 true limitations," especially because the limited medical records
 19 available indicated mild and conservative treatment. (*Id.*).

20 **C. Issues on Appeal**

21 **1. The ALJ's Residual Functional Capacity Assessment**

22 The parties dispute whether the ALJ's residual functional
 23 capacity assessment is supported by substantial evidence.

24 Plaintiff argues that the ALJ's residual functional capacity was
 25 based upon his own interpretation of the medical evidence in regard to

1 Plaintiff's alleged disability of his right knee. Specifically, Plaintiff
2 notes that three weeks before the hearing Plaintiff "was evaluated by a
3 treating orthopedic consultation (sic) where a right knee MRI was
4 assessed." (ECF 11-1 at 5). According to Plaintiff, the ALJ erred
5 because there was no opinion evidence from any treating source about
6 his functional limitations nor did Plaintiff receive a consultative
7 examination. (*Id.*). Plaintiff argues that it is beyond the scope of an
8 ALJ's authority to establish a residual functional capacity without
9 opinion evidence from a medical treatment provider. (*Id.*) Plaintiff
10 points out that the record is devoid of any opinion by a medical treating
11 or examining provider concerning Plaintiff's knee. Moreover, despite
12 Plaintiff's request for a consultative medical exam during his
13 administrative hearing, the ALJ did not authorize one. Plaintiff argues
14 "if there are conflicting medical opinions of a claimant's RFC, the ALJ
15 may choose which opinion to credit and which to reject, and the
16 regulations recognize this right" but error occurs when an ALJ makes
17 an RFC determination without medical evidence on the issue. (*Id.*).
18 Plaintiff contends, however, that since the ALJ had no medical opinion
19 evidence and failed to augment the record by ordering a consultative
20 examination, the ALJ's RFC assessment is not supported by substantial
21 evidence. (*Id.*).

22 Defendant asserts Plaintiff's argument is unpersuasive because
23 "the ALJ rationally found that Plaintiff had no impairment or
24 combination of impairments, which would preclude his ability to
25 perform other work existing in . . . the national economy." (ECF 12-1 at
4). Defendant also argues that "it was not incumbent upon the ALJ to
order a consultative examination to develop the record further in order
to assist in his analysis of his RFC." (*Id.*). Defendant cites to the

1 language § 404.1519(a) which provides that consultative examinations
2 are discretionary and there was no obligation for the ALJ to order a
3 consultative physical evaluation because “an ALJ has a duty to develop
4 the record [] only when there is ambiguous evidence or when the record
5 is inadequate to allow for proper evaluation of the evidence.” (ECF 12-1
6 at 5 citing *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001)
7 (internal citations omitted), and here neither circumstance existed.

8 The Court has conducted a thorough review of the record and
9 finds that the ALJ erred by overlooking the lack of evidence in the
10 record that accurately or completely described Plaintiff’s physical
11 functional limitations.

12 Title 20 C.F.R. § 404.1546(c) of the Code of Federal Regulations
13 states in pertinent part, “at the administrative law judge hearing level
14 ..., the administrative law judge ... is responsible for assessing your
15 residual functional capacity.” Additionally, the ALJ is required to
16 interpret the medical records. Title 20 C.F.R. § 416.927(6)(d)(1) states
17 in part, “[w]e use medial sources, including your treating source, to
18 provide evidence, including opinions, on the nature and severity of your
19 impairment(s). Although we consider opinions from medical sources . . .
20 the final responsibility for deciding these issues is reserved to the
21 [ALJ].” However, “the ALJ’s RFC determination or finding must be
22 supported by medical evidence, particularly the opinion of a treating or
23 an examining physician.” *Banks v. Barnhart*, 434 F.Supp.2d 800, 805
24 (C.D. Cal. 2006).

25 In this case, the ALJ found that the medical record showed
Plaintiff had osteoarthritis of the right knee. (A.R. 289). In November
2013 La Maestra Community Health examined Plaintiff’s knee based
upon his complaints of pain and swelling. Upon examination by Dr.

1 Ebtissam Korkis, M.D., Plaintiff exhibited tenderness to palpitation
2 accompanied by mildly reduced range of motion. (A.R. 251). Dr. Korkis
3 noted a positive anterior and posterior drawer test, however, neither
4 Plaintiff's right hip nor right ankle appeared to have reduced range of
5 motion, swelling, erythymia or effusion. (*Id.*). Dr. Korkis also reported
6 that Plaintiff's balance and gait was intact. (*Id.*) At that time Plaintiff
7 was referred for an MRI. (A.R. 252). The MRI was taken on December
8 6, 2013 and interpreted by Dr. Chang, M.D. According to Dr. Chang,
9 the MRI showed a complex tear of the medial meniscus; posterior horn
10 lateral meniscus vertical tear; osteoarthritis; chronic anterior cruciate
11 ligament tear and a popliteal cyst. (A.R. 267). The ALJ also cited to
12 Plaintiff's appointment on February 7, 2014, at the San Diego Sports
13 Medicine and Orthopedic Center. Plaintiff had x-rays of his right knee
14 and was seen by Lora Rancourt, PA-C.² Ms. Rancourt reviewed both
15 the December 2013 MRI and the more recent x-rays. Ms. Rancourt also
16 performed a physical exam of the right knee. Specifically, Ms. Rancourt
17 noted Plaintiff's range of motion was from 3 to 95 degrees, he exhibited
18 pain on both extension and flexion. Plaintiff was found to have
19 decreased strength 4+/5 in both directions but was stable varus to
20 valgus. Ms. Rancourt noted the presence of a surgical screw in his
21 proximal fibular head and also noted marked medial compartment joint
22 space loss. Her final diagnosis was right knee osteoarthritis with post
23 surgical pain. Ms. Rancourt's treatment plan included a referral to Dr.
24 Myer to discuss the removal of the surgical hardware. (A.R.19).

25 ² Ms. Rancourt's status as a Physician's Assistant gives her opinion less weight than any type of medical doctor or other licensed specialist. PAs are considered "other sources" under 20 C.F.R. 404.1513(d) and are not entitled to the same deference as "acceptable medical sources" like licensed physicians and certain other qualified specialists. See 20 C.F.R. § 404.1513(a).

1 As stated previously, the ALJ incorporated the findings from these
2 medical records into his final RFC assessment. However, notably
3 absent in these records is any evidence about how Plaintiff's right knee
4 impairment affects Plaintiff's current ability to function. "An
5 administrative law judge may not draw upon his own inferences from
6 medical reports." *See Navland v. Apfel*, 204 F.3d 853, 858 (8th Cir.
7 2000) citing *Lundi v. Weinberger*, 520 F.2d 782,785 (8th Cir. 1975)).
8 "Because a claimant's RFC is a medical question, an ALJ's assessment
9 of it must be supported by some medical evidence of the claimant's
10 ability to function in the workplace." *Lauer v. Apfel*, 245 F.3d 700,704
(8th Cir. 2001) (internal citations omitted).

11 In this case, the ALJ's RFC assessment regarding Plaintiff's knee
12 impairment was not based on substantial evidence because the ALJ
13 failed to develop the record about how Plaintiff's knee impairment
14 affects his ability to function. *Mendoza v. Barnhart*, 436 F.Supp 2d
15 1110, 1116 (C.D. Cal 2006). Specifically, Dr. Korkis, M.D. is the only
16 treating physician contained in the record. A review of Dr. Korkis'
17 medical report shows a diagnosis as mentioned above. Primarily
18 osteoarthritis with tenderness on palpitation and mildly reduced range
19 of motion. (A.R. 251). Dr. Korkis stated "[g]iven history of previous
20 trauma and surgery we need to reevaluate by MRI of the right knee.
21 And referral to orthopedics." (A.R. 252). Dr. Korkis did not provide an
22 opinion on Plaintiff's level of functional limitation.

23 Second, the results of the MRI requested by Dr. Korkis were
24 contained in a report prepared by Grossmont Imaging. Dr. Chang, M.D.
25 was the reading radiologist. Dr. Chang presented detailed findings,
including "complex tearing of the entire medial meniscus. . . ;
osteoarthritis with near complete denudation of the articular cartilage

1 in the medial femorotibial compartment. . . ; chronic anterior cruciate
2 ligament tear. . . ; small joint effusion with leaking popliteal cyst. . . .”
3 (A.R. 267). Dr. Chang did not provide any opinion as to Plaintiff’s
4 functional ability.

5 Third, Ms. Lora Rancourt-PA-C examined Plaintiff’s knee. The
6 record here shows that it was Ms. Rancourt who conducted Plaintiff’s
7 exam and reviewed the x-ray and the earlier MRI report prepared by
8 Dr. Chang. (A.R. 288-289). The record also shows that Ms. Rancourt
9 made the diagnosis of right knee osteoarthritis and postsurgical pain in
10 the report. (A.R. 289). She recommended surgery to remove the
11 “surgical screw...present in his proximal fibular head.” (*Id.*) She also
12 noted he complains of a lot of pain medially as well as laterally. (*Id.*).
13 Ms. Rancourt did not offer any opinion of Plaintiff’s functional
14 limitations. Nevertheless, the ALJ cited almost exclusively to Ms.
15 Rancourt’s report to support his RFC assessment regarding Plaintiff’s
16 alleged right knee impairment.

16 Without the benefit of any statements from these medical sources
17 about what Plaintiff could still do despite his impairment, the ALJ
18 determined that Plaintiff’s residual functional capacity could include
19 occasional climbing, kneeling, crouching and crawling. (A.R. 16).

20 Additionally, the ALJ’s citation to the opinions of the State agency
21 medical consultants did nothing to support his RFC findings.
22 Specifically, the ALJ noted, “[i]n determining the [] residual functional
23 capacity the undersigned ultimately gave little weight to the opinions of
24 the State agency medical consultants” who found no severe physical
25 impairment “and thus no corresponding limitations.” (A.R. 19, citing to
Exhibit 1A and 3A of the Administrative Record). The reports to which
the ALJ refers did not find any physical medically determinable

1 impairment because neither consultant had the reports from Dr. Korkis
2 (November 2013); the MRI results accompanied by Dr. Chang's findings
3 (December 2013); or the x-ray results accompanied by Ms. Rancourt's
4 examination and findings (February 2014). All of these records
5 postdated the State agency medical reports. Specifically, the State
6 agency medical report marked as Exhibit 1A (A.R. 50) was prepared in
7 January 2013 and the State agency medical report marked as Exhibit
8 3A (A.R. 61) was prepared in April 2013.

9 In the end, the ALJ's RFC regarding Plaintiff's alleged right knee
10 disability is not supported by substantial evidence. "Substantial
11 evidence is relevant evidence which a reasonable person might accept
12 as adequate to support a conclusion." *Reddick v. Chater*, 157 F.3d 715,
13 720 (9th Cir. 1998). "When 'the administrative record does not contain
14 any opinion by a treating or examining physician regarding plaintiff's
15 RFC,' the ALJ has a duty to obtain 'such an opinion.'" *de Lopez v.*
16 *Astrue*, 643 F.Supp. 2d 1178, 1183 (C.D. Cal. 2009) (internal citations
17 omitted). No physician has opined and no medical evidence is present in
18 the record that supports the ALJ's RFC finding of what Plaintiff can do
19 physically. The only specific evidence in the record are the results of the
20 MRI and subsequent x-ray which are consistent with each other in their
21 findings and similarly provide no opinion as to Plaintiff's functional
22 limitations or his ability to perform sustained work. Based upon the
23 evidence presented, it appears the ALJ incorrectly determined the
24 record was sufficiently complete to allow him to reach a conclusion on
25 this issue. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.
2001).

It is within the Court's discretion to decide whether to reverse and
remand for administrative proceedings or to reverse and award

benefits. *McAlister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). “If additional proceedings can remedy defects in the original administrative proceedings, a social security case should be remanded.” *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981). In this case, remand is recommended. There is insufficient evidence in the record to consider whether Plaintiff’s knee impairment has any effect on the limitations in Plaintiff’s RFC and the ALJ has the authority to obtain additional evidence to satisfy his duty to fully and fairly develop the record. *See Tonapetyan*, 242 F.3d at 1150 (9th Cir. 2001) (“The ALJ in a social security case has an independent ‘duty to fully and fairly develop the record and to assure that the claimant’s interests are considered.’”). Accordingly, the Court recommends the case be remanded for further review of Plaintiff’s alleged right knee impairment consistent with this report and recommendation.

2. Credibility of Plaintiff’s Testimony

The parties dispute whether the ALJ offered substantial evidence to support his determination that Plaintiff’s testimony regarding his non-exertional impairments.³

Plaintiff argues the ALJ failed to articulate clear and convincing reasons for rejecting his testimony. (ECF No. 11-1 at 6).

Regarding the alleged mental impairments, Plaintiff first contends there are “consistent abnormal mental status examinations.” Second,

³ Based upon the Court’s recommendation of remand for further development of the record regarding Plaintiff’s alleged right knee impairment, analysis of Plaintiff’s credibility with respect to his claimed exertional impairment is moot.

1 “treatment with prescription anti-psychotic and antidepressant
2 medication is not conservative treatment.” (*Id.*).

3 Conversely, Defendant argues there is substantial evidence
4 supporting the ALJ’s adverse credibility finding. (ECF No. 12-1 at 6).
5 Defendant states that a conservative or limited course of treatment and
6 the lack of objective evidence are each valid considerations when
7 assessing credibility. (*Id.* at 6-7). Defendant contends that Plaintiff’s
8 extreme allegations combined with his mild and conservative care may
9 indicate that Plaintiff exaggerated his true symptoms and limitations.
10 (*Id.*). Moreover, Defendant argues the objective evidence, or lack
11 thereof, does not corroborate Plaintiff’s subjective complaints. (*Id.* at 7).

12 The ALJ must make two findings before finding a Plaintiff’s
13 testimony not credible. *Treichler v. Commissioner of SSA*, 775 F.3d
14 1090, 1102 (9th Cir. 2014). First, the ALJ must determine “whether the
15 claimant has presented objective medical evidence of an underlying
16 impairment ‘which could reasonably be expected to produce the pain or
17 other symptoms alleged.’” *Id.* (quoting *Lingenfelter v. Astrue*, 504 F.3d
18 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341,
19 344 (9th Cir. 1991)). Second, if the claimant has produced such
20 objective medical evidence, “and the ALJ has not determined that the
21 claimant is malingering, the ALJ must provide ‘specific, clear and
22 convincing reasons for’ rejecting the claimant’s testimony regarding the
23 severity of the claimant’s symptoms.” *Id.* (quoting *Smolen v. Chater*, 80
24 F. 3d 1273, 1281 (9th Cir. 1996). The ALJ must specifically identify the
25 testimony found not credible and explain what evidence undermines

1 that testimony. *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
 2 2001). An ALJ is not “required to believe every allegation of disabling
 3 pain” or other impairment. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
 4 1989).

5 Here, the ALJ found that Plaintiff’s medically determinable
 6 impairments could reasonably be expected to cause the alleged
 7 symptoms. (A.R. 17). However, the ALJ found Plaintiff’s testimony
 8 “concerning the intensity, persistence and limiting effect of these
 9 symptoms are not entirely credible. . . .” (*Id.*). The ALJ cited to: a) the
 10 objective medical evidence in the record; b) evidence regarding
 11 Plaintiff’s medical treatments; c) Plaintiff’s daily activities; and d)
 12 inconsistencies in Plaintiff’s testimony.

13 **a) Objective Medical Evidence**

14 Where the ALJ finds that medically determinable impairments
 15 could reasonably be expected to cause the alleged symptoms, the ALJ
 16 may not reject a claimant’s statements regarding intensity or severity of
 17 pain or its effect on the ability to work solely because it is not supported
 18 by the objective medical evidence. 20 C.F.R. § 404.1529(c)(2). “The ALJ
 19 must specifically identify what evidence undermines the claimant’s
 20 complaints.” *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007).

21 Here, the ALJ found that Plaintiff has several severe
 22 impairments: 1) right knee osteoarthritis; 2) obesity; 3) bipolar disorder;
 23 4) anger disorder; 5) depressive disorder; 6) intermittent explosive
 24 disorder; and 7) polysubstance abuse in remission. (A.R. 14).

1 After reviewing the record medical evidence in regard to Plaintiff's
2 alleged mental impairments, the ALJ afforded significant, but not full,
3 weight to the psychiatric consultative examination on December 28,
4 2012. (A.R. 17, 229-233). At the examination, Plaintiff alleged he
5 stayed in his room all day staring out the window and reported a long
6 history of substance abuse including alcohol, cocaine and
7 methamphetamines. (*Id.*). Plaintiff could recall four numbers forward
8 and three numbers backward. (A.R. 15). In addition, he spelled the
9 word "world" backwards and subtracted 3's from 100 in two minutes
10 (but only accurately to 76). (*Id.*). The examiner reported Plaintiff spoke
11 clearly; his gait and posture was within normal limits; he groomed and
12 dressed appropriately; he did not have any hearing or vision difficulties;
13 and he did not use any assistive devices. (A.R. 229). The examiner
14 diagnosed Plaintiff with bipolar disorder, depression, polysubstance
15 abuse in remission, and assessed a GAF score of 56.⁴ (A.R. 17, 230).

16 The ALJ also afforded significant, but not full, weight to the
17 psychiatric consultative examiner's report. At Plaintiff's psychiatric
18 consultative examination, the examiner, John Jeter, MA, opined that
19 Plaintiff would experience moderate difficulties when getting along
20 appropriately with the public and supervisors and when creating and
21 maintaining good working relationships. (A.R. 17, 229-233). The
22 examiner concluded "there is no difficulty in the patient's ability to
23

24 ⁴ GAF stands for Global Assessment Functioning. On a scale of 0-100 with higher
25 scores indicating a greater level of functioning. A GAF score of 51-60 indicates
moderate symptoms or difficulty functioning. American Psychiatric Association,
Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed. 2000).

1 comprehend complex tasks.” (A.R. 233). Furthermore, the examiner
2 reported that Plaintiff “responds to instructions well. He responds to
3 positive criticism well. . . . Overall, the [Plaintiff] is cooperative,
4 motivated, and verbally responsive. His eye contact is poor. His
5 thoughts are logical, organized, simple and concrete. Content of
6 communication is age appropriate.” (A.R. 231). According to the
7 examiner, Plaintiff would have no difficulty comprehending and
8 carrying out simple directions or performing repetitive, routine simple
9 tasks. (*Id.*). Notably, Plaintiff participated in the examination before
10 he took medications. (A.R. 230).

11 The ALJ considered Plaintiff’s psychiatric treatment as well. For
12 example, in March 2013, Plaintiff began taking Celexa, a psychiatric
13 medicine. (A.R. 18, 239). In May 2013, Plaintiff began psychiatric
14 treatment. (A.R. 18). At his assessment, Plaintiff was diagnosed with
15 1) bipolar disorder, 2) intermittent explosive disorder, and 3)
16 unspecified drug dependence. (*Id.*). Plaintiff underwent psychiatric
17 treatment three more times. (*Id.*). First, in June 2013, Plaintiff
18 reported anger issue, so he received a Lithium prescription in lieu of
19 Celexa. (A.R. 300). Second, in November 2013, Plaintiff reported he
20 was anxious and still angry, so he received a Depakote prescription to
21 replace Lithium. (A.R. 290). Third, in January 2014, he received a
22 Seroquel prescription because he experienced racing thoughts, poor
23 sleep and anxiety. (A.R. 18, 290). Plaintiff was assessed a GAF score of
24 55. (A.R. 247). He confirmed Depakote’s effectiveness and reported he
25 had not been angry. (A.R. 18, 290). At the appointment, Plaintiff gave

1 good eye contact, he was alert, well-groomed, denied suicidal or
2 homicidal behavior, spoke clearly, exhibited a linear thought process,
3 demonstrated appropriate judgment and thought, and displayed good
4 motivation for treatment. (A.R. 290).

5 After citing to substantial medical evidence in the record, the ALJ
6 found the medical evidence “relatively benign” to support the level of
7 limitations alleged by the Plaintiff. (A.R. 18). Consequently, the ALJ
8 did not err in rejecting Plaintiff’s allegations of disabling mental
9 limitations.

10 **b) Medical Treatment**

11 Evidence that a claimant only received conservative treatment is a
12 valid ground for questioning claimant’s assertions regarding severity of
13 pain or symptoms. *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir.
14 1995); *accord Parra v. Astrue*, 481 F.3d 742, 750–51 (9th Cir.2007)
15 (explaining that evidence of conservative treatment is sufficient to
16 discount a claimant's testimony about severity of an impairment).
17 Additionally, the Ninth Circuit has long held that when an impairment
18 is amenable to treatment, it cannot serve as the basis of disability. *See*
19 *Warre v. Commissioner of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th
20 Cir. 2006) (citing *inter alia*, *Odle v. Heckler*, 707 F.2d 439, 440 (9th Cir.
21 1983)). In this case, Plaintiff alleged he suffers from both exertional
22 and nonexertional severe disabilities.

23 For Plaintiff’s nonexertional impairment, first, the ALJ noted that
24 “[Plaintiff] reported a history of bipolar disorder for many years, but he
25 failed to seek out psychiatric treatment until March of 2013. . . .” (A.R.

18). Second, the ALJ considered the effectiveness of medications used to treat Plaintiff's bipolar disorder and intermittent explosive disorder. (A.R. 17-18). Plaintiff indicated he used to self-medicate with substances (e.g., alcohol, cocaine and methamphetamines). (A.R. 17). The record shows Plaintiff was prescribed Depakote with effective results and no reported anger issues. (A.R. 17, 18, 35, 245). In sum, Plaintiff reported a long history of bipolar disorder without psychiatric treatment, but after he sought treatment, he controlled his anger within a year. (A.R. 17,18, 35, 245).

As noted herein, the ALJ identified several contradictions between Plaintiff's claims of disability and the medical treatment evidence presented in the record. *Sample*, 694 F. 2d at 642 ("In reaching his findings, the administrative law judge is entitled to draw inferences logically flowing from the evidence"). Given Plaintiff's allegations of severe and disabling impairments, the ALJ reasoned that Plaintiff did not seek "a greater level of intervention and/or more aggressive treatment options" as one would expect. (A.R. 18). Moreover, Plaintiff treated his mental impairments with medication. (A.R. 17, 18, 35, 245). The ALJ's citations to the record evidence regarding Plaintiff's treatment represent clear and convincing reasons for finding Plaintiff less than entirely credible.

c) Daily Activities

The Social Security regulations explicitly instruct an ALJ to evaluate the claimant's daily activities when determining the claimant's credibility. 20 C.F.R. § 404.1529(c)(3)(I); Social Security Ruling 96-7p,

1 (SSA July 2, 1996). It is well settled that “[d]isability does not mean
2 that a claimant vegetate in a dark room excluded from all forms of
3 human and social activity.” *Cooper v. Bowen*, 815 F.2d 557, 561 (9th
4 Cir. 1987) (citation omitted). An ALJ may, however, discredit a
5 claimant’s statements when the claimant reports participation in
6 everyday activities indicating capacities that are transferable to a work
7 setting. *See Morgan v. Cmm’r Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th
8 Cir. 1999); *Fair*, 885 F.2d at 603 (9th Cir. 1989). Even where those
9 activities suggest some difficulty functioning, they may be grounds for
10 discrediting the claimant’s testimony to the extent that they contradict
11 claims of a totally debilitating impairment. *See Valentine v. Comm’r*
12 *Soc. Sec. Admin.*, 574 F.3d 685, 693 (9th Cir. 2009).

13 The ALJ considered Plaintiff’s sister’s third party adult
14 functioning report dated November 28, 2012. (A.R. 182-191). An ALJ
15 may consider third party statements as evidence regarding the severity
16 of Plaintiff’s impairment. *See* 20 C.F.R. § 416.913. “If the ALJ wishes
17 to discount the testimony of the lay witnesses, he must give reasons
18 that are germane to each witness.” *Dodrill v. Shalala*, 12 F.3d 915, 919
19 (9th Cir. 1993); *Bruce v. Astrue*, 557 F3d 1113 (9th Cir. 2009). Here, the
20 ALJ considered the third party adult function report from Laurie Lynn
21 Stanley (Plaintiff’s Sister) and opined the “[s]ister, who based her
22 observations and opinions on the [Plaintiff’s] subjective complaints and
23 behavior, through no fault of her own, is found to be only partially
24 credible.” (A.R. 19). Thus, the ALJ accorded less weight to Ms.
25 Stanley’s report than the weight given to the reports of the medical

1 experts and consultative examiner. (*Id.*).

2 The ALJ found that “even if the claimant’s daily activities are
3 truly as limited as alleged, it is difficult to attribute that degree of
4 limitation to the claimant’s medical condition.” (A.R. 18). Despite
5 Plaintiff’s claim that he stays in bed, stares at walls, and looks out the
6 window from the time he wakes up until he goes to bed. (A.R. 196, 230).
7 Likewise, his sister reported that he stays in his rooms and sleeps all
8 day. (A.R. 182-191). The ALJ noted Plaintiff can groom himself,
9 prepare simple meals, do laundry, and make his own medical
10 appointments. (A.R. 15). Plaintiff also reported good sleep, a good
11 appetite, and an ability to cash checks and pay bills. (A.R. 230). He
12 acknowledged he can cash checks and pay bills. (*Id.*). When he goes
13 outside, he can go outside alone. (A.R. 198). After considering the
14 relevant evidence in the record, the ALJ found insufficient support for
15 the level of limitations alleged by the Plaintiff. The ALJ determined
16 “the limited range of daily activities is a lifestyle choice and not due to
17 any established impairment.” (A.R. 18). The ALJ’s citations to the
18 record evidence regarding Plaintiff’s daily activities represent clear and
19 convincing reasons for finding Plaintiff less than entirely credible.

20 **d) Inconsistencies in Plaintiff’s Testimony**

21 Inconsistency in the claimant’s testimony is an acceptable reason
22 that an ALJ may consider when assigning little weight to a claimant’s
23 testimony. *Orn v. Astrue*, 495 F.3d 625, 636 (9th Cir. 2007). An ALJ is
24 permitted to use “ordinary techniques of credibility evaluation” such as
25 inconsistent prior statements. *Tonapetyan*, 242 F.3d at 1148 (9th Cir.

1 2001). “Consistency is one strong indication of the credibility of an
2 individual’s statements” Social Sec. Ruling, 96-7p, (SSA July 2,
3 1996).

4 In social functioning, the ALJ found inconsistencies between
5 Plaintiff’s testimony and the record. (A.R. 15). Plaintiff stated he
6 neither socialized nor visited with friends or family. (A.R. 15).
7 Similarly, he testified he does not get along with co-workers,
8 supervisors, and he could not handle people walking close to him. (A.R.
9 37). However, he lived with his sister in 2012 and currently resides
10 with a friend. (*Id.*). Despite Plaintiff’s testimony, the psychiatric
11 consultative examiner opined Plaintiff only has moderate difficulty in
12 his “ability to get along appropriately with the public and with
13 supervisors” as well as his “ability to create and maintain good working
14 relationships.” (A.R. 233). Notably, Plaintiff was not on any psychiatric
15 medication at the examination in December 2012, but he began taking
16 Depokote in November 2013. (A.R. 18, 233, 290). Revealingly, Plaintiff
17 testified about Depokote’s efficacy: “[I]t keeps me calm where I’m not
18 angry at the world or anyone.” (A.R. 36). The ALJ’s citations to the
19 record evidence regarding Plaintiff’s social functioning and
20 inconsistencies in the testimony represent clear and convincing reasons
21 for finding Plaintiff less than entirely credible.

22 In assessing Plaintiff’s alleged racing thoughts and inability to
23 focus, the ALJ found inconsistencies between Plaintiff’s testimony and
24 the record. (A.R. 15) As mentioned, Plaintiff reported he experienced
25 racing thoughts and inability to focus. (A.R. 15, 32, 36). Nonetheless,

1 at his psychiatric consultative examination, he spelled the word “world”
2 backwards, recalled four numbers forward and 3 numbers backward,
3 and he subtracted 3’s from 100 in two minutes (only accurately to 76).
4 (*Id.*). The examiner reported that Plaintiff’s thoughts were “logical,
5 organized, simple and concrete.” (A.R. 231). He concluded “there is no
6 difficulty in the [Plaintiff’s] ability to comprehend complex tasks.” (A.R.
7 233). Furthermore, in January 2014, at Plaintiff’s last psychiatric
8 follow-up, Plaintiff gave good eye contact, was alert, denied suicidal or
9 homicidal behavior, spoke clearly, exhibited a linear thought process,
10 demonstrated appropriate judgment and thought, and displayed good
11 motivation for treatment. (A.R. 290). Thus, the ALJ’s citations to the
12 record evidence regarding Plaintiff’s ability to focus or concentrate and
13 inconsistencies in the testimony represent clear and convincing reasons
14 for finding Plaintiff less than entirely credible.

15 As noted herein, the ALJ has identified several contradictions
16 between Plaintiff’s claims of disability and the medical evidence
17 presented in the record. *Sample*, 694 F.2d at 642 (“in reaching his
18 findings, the administrative law judge is entitled to draw inferences
19 logically flowing from the evidence.”). The ALJ’s citations to the record
20 represent clear and convincing reasons for finding Plaintiff less than
21 credible regarding his functional limitations and for rejecting Plaintiff’s
22 testimony. First, the ALJ considered the objective medical findings.
23 *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (explaining
24 that medical evidence is a factor that the ALJ can consider in his
25 credibility analysis). Second, the ALJ considered the effectiveness of

1 medications and treatment in discounting the severity of Plaintiff's
 2 alleged disability. Third, the ALJ considered Plaintiff's daily activities.
 3 Fourth, the ALJ found inconsistencies between Plaintiff's testimony and
 4 information in the record. *See Burch*, 400 F.3d at 680 ("In determining
 5 credibility, an ALJ may engage in ordinary techniques of credibility
 6 evaluation, such as considering claimant's reputation for truthfulness
 7 and inconsistencies in claimant's testimony.").

8 The ALJ made specific findings based upon the administrative
 9 record justifying the decision to disbelieve Plaintiff's allegations of
 10 disability. The ALJ discussed the evidence and provided clear and
 11 convincing reasons upon which his adverse determination of Plaintiff's
 12 credibility was based. *Treichler v. Commissioner of Social Sec. Admin.*,
 13 775 F.3d 1090, 1103 (9th Cir. 2014). "Credibility determinations are
 14 the province of the ALJ" and are entitled to deference if sufficiently
 15 supported by the record. *Fair*, 885 F.2d at 604 (citing *Russell v. Bowen*,
 16 856 F.2d 81, 83 (9th Cir. 1988)). "Where, as here, the ALJ has made
 17 specific findings justifying a decision to disbelieve an allegation. . . and
 18 those findings are supported by substantial evidence in the record, our
 19 role is not to second guess that decision." *Id.* Because a reviewing court
 20 must uphold an ALJ's decision if it is supported by substantial
 21 evidence, this Court recommends denying Plaintiff's second claim.

22 **III. CONCLUSION**

23 As the Court finds that the ALJ did not adequately address
 24 Plaintiff's claim of right knee disability, the Court **RECOMMENDS**
 25

1 that the case be **REMANDED** for further development of the record
 2 regarding Plaintiff's exertional claim.

3 **IT IS FURTHER RECOMMENDED** that Plaintiff's Motion be
 4 **DENIED** and that Defendant's Motion be **GRANTED** as to Plaintiff's
 5 non-exertional claims presented herein. This Report and
 6 Recommendation of the undersigned Magistrate Judge is submitted to
 7 the United States District Judge assigned to this case, pursuant to the
 8 provisions of 28 U.S.C. § 636(b)(1).

9 **IT IS HEREBY ORDERED** that any written objection to this
 10 **REPORT** must be filed with the Court and served on all parties no later
 11 than **January 3, 2017**. The document should be captioned "Objections
 12 to Report and Recommendations."

13 **IT IS FURTHER ORDERED** that any reply to the objections
 14 shall be filed with the Court and served on all parties no later than
 15 **January 10, 2017**. The parties are advised that failure to file
 16 objections within the specific time may waive the right to raise those
 17 objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d
 18 1153 (9th Cir. 1991).

19 **IT IS SO ORDERED.**

20 Dated: December 19, 2016



21
 22 Hon. Mitchell D. Dembin
 23 United States Magistrate Judge
 24
 25